

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

William Schmitz
Barbara Schmitz

NOTICE OF HEARING AND
MOTION FOR RELIEF FROM
AUTOMATIC STAY

Debtors

Chapter 7, Case No. 04-45121

TO: William Schmitz and Barbara Schmitz, INCLUDING TRUSTEE AND OTHER
INTERESTED PARTIES

1. Wells Fargo Bank, N.A., (“Movant”), a corporation, by its attorneys, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 2:00 p.m. on November 4, 2004, in Courtroom 8 West, 300 South Fourth Street, Minneapolis, MN 55415 or as soon thereafter as counsel can be heard.

3. Any response to this motion must be filed and delivered not later than on November 1, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than October 26, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays).

UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, FRBP Nos. 5005 and Local Rule 1070-1. This is a core proceeding. The Chapter 7 case was filed on September 14, 2004, and is now pending in this court.

5. This motion arises under 11 U.S.C. § 362 and Federal Rules of Bankruptcy Procedure 4001, and is filed under Federal Rules of Bankruptcy Procedure 9014 and Local Rules 1201-1215. Movant requests relief with respect to the property of Debtors, subject to a mortgage to Movant.

6. Debtors above-named are the owners of certain real property located at 320 7th Street North, Kandiyohi, MN 56251, legally described as follows, to-wit:

Lots 9 and 10 of Block 3 in First Addition to the Village (now city) of Kandiyohi, Minnesota, according to the Map or Plat thereof on file and of record in the Office of the County Recorder in and for Kandiyohi County, Minnesota.

7. The indebtedness of William Schmitz and Barbara Schmitz is evidenced by a Promissory Note and Mortgage dated June 27, 1997, filed of record in the Kandiyohi County Recorder's office on June 27, 1997, and recorded as Document No. 423881. A true and correct copy of the front page of the recorded mortgage is attached as Exhibit A.

8. The Debtors have failed to pay monthly mortgage payments since July 1, 2004, and are in default in the amount of \$4,773.07 together with reasonable attorneys fees and costs incurred pursuant to the note and mortgage. Debtors have failed to make any offer of adequate protection. Accordingly, Movant's interest is inadequately protected.

9. The total amount due under the mortgage and note as of the date of hearing is approximately \$94,700.00

10. The Debtors have scheduled a second mortgage in favor of Wells Fargo Home Equity in the amount of \$37,927.59. Upon information and belief, the principal balance of said mortgage is still in that amount.

11. The Debtors have scheduled a third mortgage in favor of Wells Fargo Home Equity in the amount of \$9,820.00. Upon information and belief, the principal balance of said mortgage is still in that amount.

12. The Debtors have estimated the value of the homestead as \$140,000.00, and accordingly, Debtors have no equity in the premises and the property is not necessary to an effective reorganization.

13. By reason of the foregoing, Movant is entitled to have the automatic stay lifted and vacated so it can recommence the mortgage foreclosure action pursuant to Minnesota Statutes.

WHEREFORE, Movant by its undersigned attorney, moves the Court for an Order that the automatic stay provided by 11 U.S.C. Section 362 (A) be terminated to permit Movant to foreclose its mortgage on the subject property, and for such other and further relief as may be just and equitable.

Dated: October 18, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo
Paul A. Weingarden, #115356
Brian H. Liebo #277654
Attorney for Movant
4500 Park Glen Road, #120
Minneapolis, MN 55416
(952) 925-6888

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

IN RE:

William J. Schmitz
Barbara K. Schmitz

AFFIDAVIT OF PETITIONER

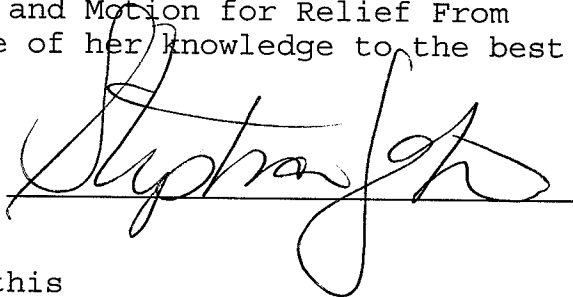
Debtors

Chapter 7, Case No. 04-45121

STATE OF GEORGIA

COUNTY OF FULTON

Stephanie Johnson, being first duly sworn, deposes and states she is authorized representative of Movant and has direct real-time access to the computer records of Movant which are maintained in the ordinary course of business and that she has read the annexed Notice of Hearing and Motion for Relief From Automatic Stay, and that it is true of her knowledge to the best of her information.



Subscribed and sworn to before me this
5th day of October, 2004.

Donna M. Kelly
Notary Public

6416114

MNCM-3024-C-1

Registration tax hereon of \$ 224⁷¹
 has been paid in receipt No. 37030
Jim M. Moller Co., Treasurer
 Countersigned Kate
Jim Moller Co., Auditor
Kate Deputy

20139 # 19.50
 Kate
 OFFICE OF COUNTY RECORDER
 KANDIYOHKI COUNTY MINNESOTA
 CERTIFIED TO BE FILED
 AND/OR RECORDED ON

JUN 27 1997

TIME 2:15 AM PM
 JULIE GRAVLEK
 COUNTY RECORDER
 BY Susan Bredeson DEPUTY
 KATC

[Space Above This Line For Recording Data]

MORTGAGE

THIS MORTGAGE ("Security Instrument") is given on JUNE 27, 1997
 The mortgagor is WILLIAM J. SCHMITZ JR. AND BARBARA K. SCHMITZ, HUSBAND AND WIFE

("Borrower"). This Security Instrument is given to NORWEST MORTGAGE, INC.

which is organized and existing under the laws of THE STATE OF CALIFORNIA, and whose
 address is P.O. BOX 5137, DES MOINES, IA 503065137

("Lender"). Borrower owes Lender the principal sum of
 NINETY SEVEN THOUSAND SIX HUNDRED FIFTY AND 00/100

Dollars (U.S. \$*****97,650.00).

This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which
 provides for monthly payments, with the full debt, if not paid earlier, due and payable on
 JULY 01, 2027 and for interest at the yearly rate of 7.750

percent. This Security Instrument secures to Lender: (a) the repayment of
 the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the
 payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security

MINNESOTA-Single Family-FNMA/FHLMC UNIFORM INSTRUMENT

1210 -8R(MN) (9702)

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VMP MORTGAGE FORMS - (800)521-7281

Form 3024
 Amended
 Initials: WJ



MICROFILM 42388 1

Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender, with power of sale, the following described property located in KANDIYOHI County, Minnesota:

LOTS 9 AND 10 OF BLOCK 3 IN FIRST ADDITION TO THE VILLAGE (NOW CITY) OF KANDIYOHI, MINNESOTA, ACCORDING TO THE MAP OR PLAT THEREOF ON FILE OR OF RECORD IN THE OFFICE OF THE COUNTY RECORDER IN AND FOR KANDIYOHI COUNTY, MINNESOTA.

THIS IS A PURCHASE MONEY SECURITY INSTRUMENT.

TAX STATEMENTS SHOULD BE SENT TO: NORWEST MORTGAGE INC., P.O. BOX 5137, DES MOINES, IA 503065137

which has the address of 320 7TH STREET NORTH, KANDIYOHI
Minnesota 56251

[Street, City].

[Zip Code] ("Property Address");

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal and Interest; Prepayment and Late Charges.** Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayment and late charges due under the Note.

2. **Funds for Taxes and Insurance.** Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard or property insurance premiums; (d) yearly flood insurance premiums, if any; (e) yearly mortgage insurance premiums, if any; and (f) any sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payment of mortgage insurance premiums. These items are called "Escrow Items." Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. Section 2601 *et seq.* ("RESPA"), unless another law that applies to the Funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with applicable law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is such an institution) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items. Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. However, Lender may require Borrower to pay a one-time

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

William Schmitz
Barbara Schmitz

MEMORANDUM OF LAW

Debtors

Chapter 7, Case No. 04-45121

Wells Fargo Bank, N.A. ("Movant"), submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

FACTS

Movant holds a valid, perfected mortgage on real property owned by the Debtors. On the date of filing, the Debtors were delinquent under the note and mortgage. Since this case was filed Debtors have made no payments to Movant and the arrears total \$4,773.07.

ARGUMENT

1. Under Section 362.(d)(2) of the Bankruptcy Code, relief from the automatic stay shall be granted upon request of a creditor "for cause, including the lack of adequate protection of an interest in property of such creditor." The Debtors in this case have failed to make payments required by the note and mortgage for a period of more than 5 months. Debtors have not otherwise provided Movant with adequate protection of its interest in the property. Such circumstances constitute cause, within the meaning of §362(d)(1), justifying relief from the stay. In Re: Video East, Inc., 41 B.R. 176 (Bkrtcy. E.D. Pa. 1984); In Re: Frascatore, 33 B.R. 687 (Bkrtcy. E.D. Pa. 1983).

2. Pursuant to §362(d)(2) of the Bankruptcy Code, relief from the stay is appropriate where Debtors have no equity and the property is not necessary to an effective reorganization. 11 U.S.C. §362(d)(2). See, In Re: Gellert, 55 B.R. 970 (Bkrtcy. D. N. H. 1983). In this case the

balance due Movant is approximately \$94,700.00 and including the amount due the second and third mortgage holders, the approximate total amount encumbering the property is \$142,447.00. The value of the property is approximately \$140,000.00. Clearly, the Debtors have no equity in the property, and as this is a Chapter 7 case, the property is not necessary to an effective reorganization.

CONCLUSION

Movant is entitled to relief from the automatic stay pursuant to 11 U.S.C. §362(d)(1) for cause, where its interest in the secured property is not adequately protected. Movant is also entitled to relief from the automatic stay pursuant to 11 U.S.C. §362(d)(2) when Debtors have no equity, and when the property is not necessary to an effective reorganization.

Movant respectfully requests an Order of this Court modifying the automatic stay consistent with the attached proposed Order.

Dated: October 18, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo
Paul A. Weingarden, #115356
Brian H. Liebo #277654
Attorney for Movant
4500 Park Glen Road, #120
Minneapolis, MN 55416
(952) 925-6888

U.S. BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

William Schmitz
Barbara Schmitz

Debtors

UNSWORN DECLARATION
FOR PROOF OF SERVICE

Chapter 7, Case No. 04-45121

Erin Kay Buss, employed on this date by USSET & WEINGARDEN, attorney(s) licensed to practice law in this court, with office address of Suite 120, 4500 Park Glen Road, Minneapolis, Minnesota 55416, upon penalty of perjury, declares that on October 18, 2004, I served the annexed Notice of Hearing and Motion for Relief from Automatic Stay upon each of the entities named below by mailing to them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota, addressed to each of them as follows:

Office of the United States Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Dorriane A. Larison
Chapter 7 Trustee
1010 W. St. Germaine Rm 600
St. Cloud, MN 56301

Raymond R. Waechter
Waechter & Gustafson
328 5th Street SW
Willmar, MN 56201

William Schmitz
Barbara Schmitz
320 7th Street North
Kandiyohi, MN 56251

/E/ Erin Kay Buss
Erin Kay Buss

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

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Barbara Schmitz

ORDER

Debtors.

Chapter 7, Case No. 04-45121

The above entitled matter came on for hearing upon motion of Wells Fargo Bank, N.A., ("Movant"), pursuant to 11 U.S.C. Section 362 on November 4, 2004, at the U.S. Bankruptcy Court, Minneapolis, Minnesota. Appearances were as noted in the record. Based upon the evidence adduced at said hearing, the arguments of counsel, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED THAT:

The automatic stay imposed by 11 U.S.C. §362 is hereby terminated as to the real property over which the Movant, its successors and/or assigns, has an interest, said property legally described as follows, to-wit:

Lots 9 and 10 of Block 3 in First Addition to the Village (now city) of Kandiyohi, Minnesota, according to the Map or Plat thereof on file and of record in the Office of the County Recorder in and for Kandiyohi County, Minnesota.

Movant may proceed to foreclose its mortgage in accordance with Minnesota Statutes. Movant's request for attorneys fees and costs shall not be considered as this is governed by state law. Notwithstanding Federal Rules of Bankruptcy Procedure 4001(a)(3), this order is effective immediately.

Dated this __ day of _____, 2004.

Judge of the Bankruptcy Court